STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

KEVIN KAVANAUGH,
Defendant-Appellee

Supreme Court No.: 156408
Court of Appeals No.: 330359
Lower Court No.: 2014-004247-FH

DEFENDANT-APPELLEE KEVIN KAVANAUGH'S BRIEF IN OPPOSITION TO THE GOVERNMENT'S APPLICATION FOR LEAVE TO APPEAL

DANIEL W. GROW (P48628)
Daniel W. Grow, PLLC
Attorney for Defendant-Appellee
800 Ship Street, Suite 110
Saint Joseph, Michigan 49085
(269) 519-8222
dan@growdefense.com

TABLE OF CONTENTS

ORDER APPEALED FROM and STATEMENT OF JURISDICTION

The government's application for leave seeks the review of the Court of Appeal's published opinion dated July 6, 2017, reversing the trial court's denial of the defendant's motions to suppress. *People v. Kavanaugh,* ____Mich. App. _____; ____ NW2d ____(2017) (Docket No. 330359). Defendant agrees this court has jurisdiction to determine if it will hear the application pursuant to MCR 7.303(B). However, because Court of Appeals stated the proper legal principles both regard to suppression issues (where the trial court erred), and because Court of Appeals utilized the proper standard of review, the concerns raised in the application are factually specific and individualized to this matter; this court should deny the application.

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. In terms of the controlling principles stated in Caballes and Rodriguez, the applicant does not assert that the Court of Appeals erred (and likewise does not assert the trial court did not err), but instead argues that while the Court of Appeals stated the correct standard of review, the Court of Appeals didn't really follow that standard, and that under the specific and individualized circumstance presented, a different outcome should have been reached; for those reasons and because the correct conclusion was reached, should leave be granted?

Applicant says, "yes."

Defendant says, "no."

II. The applicant's second argument points to a number of concerns without identifying any clear legal errors. The general governing principles are well established, and because the court of appeals did not state a novel or erroneous legal principle, and because applicant is not asking for an obvious change in the law, should leave be granted?

Applicant says, "yes."

Defendant says, "no."

INTRODUCTION

In the Court of Appeals, Defendant asserted that there were three distinct reasons why the trial court should be reversed. The Court of Appeals agreed with the first argument, that the trial court erred by denying his suppression motions, the trial court violating the principles in *Rodriguez v. United States*, 575 U.S. ____ (2015).[1]

While it was necessary for the Court of Appeals to make it clear to the trial court that *Rodriguez* must be followed, the application here should be denied. Applicant does not assert that the Court of Appeals erred in terms of *Caballes* and *Rodriguez* (and likewise does *not* assert the trial court did *not* err), but instead argues while the Court of Appeals stated the correct standard of review, the Court of Appeals didn't really follow that standard. Applicant focuses on the specific and individualized circumstances that are particular to this case, and asserts different outcome should have been reached by the Court of Appeals. The expression of concerns without identifying any clear legal errors is insufficient. Leave should not be granted.

---

[1] Defendant also argued that, subsequent to trial, a significant *Brady* violation was revealed and that either the dismissal of the charges or a grant of a new trial was merited. The third argument was that, in light of the testimony at the suppression hearing and the testimony at the bench trial (and perhaps in light of the additional discovery revealed after trial), the trial court, as trier of fact, should have been concerned about the veracity of the witnesses testimony and their motivations, such that there was reasonable doubt; the trial court should have either found the defendant not guilty or otherwise reconsidered the suppression motion. Defendant also maintained the trooper did not have a legitimate basis to initially stop Mr. Kavanaugh

PROCEDURAL BACKGROUND

Charges were authorized following a claimed "traffic stop" of Kevin Kavanaugh on October 14, 2014. A suppression motion was filed in November of 2014, and was heard on January 15, 2015. Defendant's suppression motion was denied, and a motion for reconsideration was filed. The trial court granted the motion in part, finding that the video of the stop *should have been admitted* for purposes of the motion to suppress. Defendant also informed the trial court of the pending United States Supreme Court matter of *Rodriguez v. United States*, which had yet to be decided. The trial court denied the motion to reconsider as to the suppression motion itself. The trial court entered its Order denying Defendant-Appellant's motion to suppress on February 20, 2015.

Defendant thereafter sought leave to appeal to the Michigan Court of Appeals. At the time Defendant filed his application for leave,the United States Supreme Court had not yet ruled in *Rodriguez v. United States*. While the application was pending (specifically on April 21, 2015) *Rodriguez v. US*, No. 13-9972 (S. Ct. April 21, 2015)[2] was decided and on April 28, 2015, Defendant filed a Submission of Supplemental Authority

---

[2] Which states in part:

> In *Illinois v. Caballes*, 543 U. S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, there- fore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. *Id.*, at 407. The Court so recognized in *Caballes*, and we adhere to the line drawn in that decision.

in the Court of Appeals. Just weeks later, the Court of Appeals denied his application,[3] and it is uncertain whether the opinion in *Rodriguez v. United States* was taken into consideration. The Court of Appeals denied his application on May 20, 2015

On June 30, 2015, Mr. Kavanaugh sought leave to the Michigan Supreme Court. In anticipation of a previously scheduled status conference, Defendant had filed an emergency motion to continue the stay pending the Supreme Court's review of the matter. Notwithstanding the trial court's own stay order was still in place, the trial court held a status conference on August 3, 2015, and granted the prosecution's request to lift the stay; the court set the case for trial 10-days later.

In response, Mr. Kavanaugh asked the Michigan Supreme Court to stay the trial proceedings. His motion to stay was denied on August 12, 2016. And the matter went to trial the following day.

The matter proceeded to a bench trial on August 13 and August 14, 2015. At the conclusion of the trial, the defendant was convicted of the charge. At that hearing, it was again argued that the charges against the defendant should be dismissed under the 4th Amendment and *Brady*.[4] The court denied the motions.

After the trial, it was revealed that video from the stop, as captured by the K9 officer, existed, but had <u>not</u> been disclosed. The video had (1) been requested in writing,

---

[3] The order of the Court of Appeals stated that the application was denied "for failure to persuade the Court of the need for immediate appellate review."

[4] During the course of the trial, Deputy Haskins was again asked about any recordings he may have made. The judge suggested it was ***not*** the prosecutor's duty to follow up with the request. (Transcript of August 13, 2015, page 146, line 6.) The judge went on to say, "I don't want to burden her with -- with your discovery requests..." (Transcript of August 13, 2015, page 146, line 18.) The prosecutor represented that a discovery request had not been made (*Id.*, 146:23), and counsel for the defendant explained that it had been made (*Id.*, 147:1). The judge also refused to let counsel recall Haskins (*Id.*, 146:13).

(2) was requested at the pre-trial evidentiary hearing, and (3) had been requested during the course of trial.

On September 2, 2015, Defendant filed a motion to adjourn sentencing and a motion to dismiss based on the *Brady* violations. On October 29, 2015, a supplemental brief in support of the *Brady* motions was filed, as well as a motion to adjourn sentencing and a motion for bond on appeal. A hearing went forward on September 21, 2015. Another hearing went forward on November 2, 2015. Defendant's motions were denied, and Mr. Kavanaugh was sentenced.

After he was convicted, he again appealed. The Court of Appeal reversed the trial court by its published opinion dated July 6, 2017, reversing the trial court's denial of the defendant's motions to suppress. *People v. Kavanaugh,* ____Mich. App. _____; ____ NW2d ____(2017) (Docket No. 330359). The government now seeks leave to appeal.

ARGUMENT

The Court of Appeals properly found the trial court violated the principles state in *Rodriguez v. United States*, 575 U.S. ____ (2015). To the extent the trooper had a legitimate basis to initially stop Mr. Kavanaugh, there was no basis to justify continued detention, and after a lengthy delay, a canine unit appeared. While Defendant maintains *Brady* was violated and that in light of the trial testimony, the trial court, as trier of fact, should have been concerned about the veracity of the witnesses testimony and their motivations, because Court of Appeals stated the proper legal principles both regard to suppression issues (where the trial court erred), and because Court of Appeals stated the proper standard of review, leave must be denied. The concerns stated in the government's application are factually specific and individualized to this matter.

I. In terms of the controlling principles stated in *Caballes* and *Rodriguez*, the applicant does not assert that the Court of Appeals erred (and likewise does *not* assert the trial court did *not* err), but instead argues that while the Court of Appeals stated the correct standard of review, the Court of Appeals didn't really follow that standard, and that under the specific and individualized circumstance presented, a different outcome should have been reached; for those reasons and because the correct conclusion was reached, leave should be denied.

> *Standard of Review* -Although Michigan appellate courts will review *de novo* ultimate decisions on motions to suppress evidence, *People v Galloway*, 259 Mich App 634, 638, 675 NW2d 883 (2003), they will review the lower court's findings of fact in connection with the suppression of evidence for clear error. *People v Farrow*, 461 Mich 202, 208–209, 600 NW2d 634 (1999). Generally speaking, factual findings are clearly erroneous if there is no evidence to support them or there is evidence to support them but [the Appellate] Court is left with a definite and firm conviction that a mistake has been made. *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 588, 654 NW2d 572 (2002), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 270, 600 NW2d 384 (1999).

Mr. Kavanaugh, was pulled over for a claimed[5] traffic violation. After the stop, the trooper failed to detect any suspicious odors. Mr. Kavanaugh did not appear to be sleepy or intoxicated. With no warrants and a valid license, the trooper decided to give Mr. Kavanaugh a verbal warning, and returned his paperwork.

The stop ended when the trooper handed Mr. Kavanaugh his paperwork and explained the warning. Mr. Kavanaugh should have been allowed to leave. The trooper did not stop his questioning or tell Mr. Kavanaugh that he was free to leave. Instead, he continued to question Mr. Kavanaugh. He denied illegal activity and denied there were drugs or weapons in the vehicle. Instead of allowing him to leave, the trooper waited for

---

[5] Defendant maintains that the recording instead seems to show Mr. Kavanaugh did not violate any visible traffic laws, other than perhaps the turn-signal, which Defendant asserts is either so contrived it should be completely discounted or that it, under the circumstances here, is not a moving violation. Of course it is now known that the entire stop was essentially a ruse.

the K9 officer to arrive. The drug dog "indicated" on the vehicle, and Daniels succeeded in his task. The Court of Appeals appropriately reversed the trial court.[6]

TESTIMONY AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Trooper Daniels[7] and Deputy Haskins[8] both testified (Daniels made the traffic stop, and Haskins arrived later with the "drug dog"). Trooper Daniels explained that "we had information about the vehicle prior to the traffic stop." (Transcript of hearing January 15, 2015, page 26, line 25. This transcript was identified as Exhibt B to the Court of Appeals, and is referred to as "B page:line" herein) The information prior to the stop was "that there was a vehicle that needed to be stopped by the Metropolitan Enforcement Team"; (B 27:3) "the vehicle description, and that the vehicle had left Grand Rapids and was headed south on 196." (B 27:6) Daniels testified that he received this information from him supervisor, Sergeant Patino. (B 27:10)

Daniels confirmed when he first observed the silver Accord, he witnessed no traffic violation at the time. (B 28:10) Daniels confirmed that as soon as the car passed

---

[6] At the evidentiary hearing, the court found that the delay was 10-minutes, an amount of time the trial court felt was not "**unreasonable or excessive**." (Transcript of hearing January 15, 2015, page 52, line 1-7). When the issues were raised again after trial, the court ruled in a similar manner, stating, "**The delay was - - not excessive** - - ten minutes or less from the Court's viewing of the video tape." (Transcript dated August 14, 2015, at page 52, line 11-13.) While the court was without the benefit of *Rodriquez* at the time of the suppression motion, the correct legal standard was extensively briefed and argued in August of 2015, and the error can't be excused.

[7] Daniels has been employed with Michigan State Police for 14 years. (B 13:18) His present duties include traffic enforcement, criminal investigation, and he is currently assigned to an interdiction team in Paw Paw. (13:23)

[8] Haskins testified that he has been employed by Berrien County Sheriff's Department as a K9 handler for the last seven years. (B 4:18) For three years prior to this, Haskins was employed as a police officer by the City of New Buffalo. (B 4:21)

he pulled out immediately. (B 29:7) Daniels confirmed that after having run the vehicle I.D. and both driver's licenses, he had not observed or smelled any drugs, and had not observed any weapons. (B 38:4) Daniels confirmed that after Kavanaugh denied consent he requested the K9 unit; (B 39:18) "he wasn't free to leave at that point." (B 39:21) Daniels confirmed that at least 10 minutes of the stop was spent waiting for the drug dog to arrive. (B 43:1) Daniels agreed it was about 22 minutes after the stop that the dog arrived. (B 40:6)

The suppression hearing started, however, with the story that Defendant's vehicle caught Daniels' attention (B 14:20) because the car appeared to have a "paper plate flapping, where the license plate should be at." (B 15:1) He next claimed that he pursued the vehicle to verify the vehicle had a valid plate. (B 15:6) He finally claimed that the vehicle then made an abrupt lane change without signaling and got off the highway [9](B 16:6) so he initiated a traffic stop for failing to signal the lane change. (B 16:18)[10]

Daniels also claimed that after the stop, when Mr. Kavanaugh handed him his license, Mr. Kavanaugh's hand was shaking.[11] (B 18:21) Again, Defendant's demeanor as revealed on the video seems inconsistent with Daniels' characterization. Daniels

---

[9] In reference to the exit ramp on which Kavanaugh exited the highway, Daniels agreed that on one side is a guard rail and then on the other side is a ditch, (B 32:5) and up by the stop sign where Kavanaugh chose to stop, there was a big wide area where he could pull clear of the roadway. (B 32:20)

[10] He also claimed that the vehicle did not immediately stop, and it appeared the driver was making "furtive movements." (B 17:8) The video of the stop seems to belie these claims, in addition to his claim the paper (actually thick cardboard) plate was "flapping." In terms of the composition of the "paper plate", Daniels maintained it can be seen moving on the video. (B 30:12)

[11] The video of the stop seems to belie this claims, as the Court of Appeals concluded. In any case, Daniels also admitted that it is not uncommon for people to be nervous when stopped by law enforcement. (B 35:20)

testified that he advised the driver the reason for the traffic stop and requested the vehicle paperwork. (B 18:24) He recalled that Mr. Kavanaugh explained he had just purchased the vehicle and didn't have any paperwork, or the purchase agreement for the vehicle. (B 19:1) Daniels requested Kavanaugh exit the vehicle and come back to his patrol car to take care of paperwork. (B 19:8) Kavanaugh complied and walked back to the patrol car and sat in the front passenger seat. (B 20:4) He asked Mr. Kavanaugh and his passenger many questions about their travels, seemingly in an effort to find differences in their stories.[12] Daniels also claimed he wanted to verify that the VIN number from the computer matched the VIN number on the car since he didn't have any paperwork. (B 21:14)

Daniels eventually informed Mr. Kavanaugh he was not going to be issued a citation for the failure to signal lane change. (B 22:5) Daniels then asked Mr. Kavanaugh if there was anything illegal in the vehicle; marijuana. cocaine, heroin, ecstasy, large

---

[12] Kavanaugh explained he was coming from Grand Rapids, having visited friends up there for three days. (B 20:11) Daniels claimed while speaking with Kavanaugh, he became increasingly nervous. Daniels speculated Kavanaugh seemed nervous because he was scratching his head, scratching his leg, not making eye contact, he kept looking out the door. (B 20:14) Daniels concluded Kavanaugh felt "very uncomfortable" sitting in the patrol car and that he did not want to be there. (B 20:17) Daniels asked Kavanaugh if they did anything special in Grand Rapids. Kavanaugh said no. (B 20:23) Daniels asked Kavanaugh whose idea it was to travel to Michigan. Kavanaugh replied that his friends asked "us", and then he said "me" to come up. (B 21:1) Daniels asked Kavanaugh what his relationship was with Bobbie, and he explained she was a coworker and a friend. (B 21:4) Daniels asked Kavanaugh where he was traveling to, and Kavanaugh replied back to Florida. (B 21:5) Daniels then had a brief conversation with Brown regarding their travel plans. Brown informed Daniels that they had gone to an art festival in Grand Rapids, and they were on their way back to Florida. (B 21:20) Daniels asked Brown if Kavanaugh was her boyfriend, to which Brown stated yes, they were trying to work things out. (B 21:22) **Daniels claimed Brown stated "they had stayed at the, I believe it was a *Grand Travel Lodge*, if I'm not mistaken." (B 21:25) Her answer supposedly conflicted with the answer given by Kavanaugh in that he gave Daniels a different location of where they had stayed. "I believe he said they stayed at the *Travel Lodge*." (B 22:3)**

amounts of money; all things Mr. Kavanaugh denied.(B 22:9)[13] Mr. Kavanaugh denied consent to search the vehicle, and in response, Daniels informed Kavanaugh he was contacting a K9 unit to perform a "free air sniff" around the vehicle. (B 22:15) On questioning by the prosecutor, Daniels claimed that based on his "observations," it appeared to him that there was "something going on, whether it involved drugs, or something else, that was unknown." (B 23:10)

Again, after having run the vehicle I.D. and both driver's licenses, he had not observed or smelled any drugs, and had not observed any weapons. (B 38:4) Daniels confirmed that after Kavanaugh denied consent he requested the K9 unit; (B 39:18) "he wasn't free to leave at that point." (B 39:21) Daniels confirmed that at least 10 minutes of the stop was spent waiting for the drug to arrive. (B 43:1) Daniels agreed it was about 22 minutes after the stop that the dog arrived. (B 40:6)

Deputy Haskins eventually arrived, got his K9 out, and ran him around the vehicle. (B 6:14) On the first pass around the trunk area, the dog supposedly had a "change behavior," (B 6:15) and on the second pass the dog "sniffed the trunk area very

---

[13] Trained in interdiction, police officers increasingly ask about drugs and weapons as part of routine traffic stops. As Professor LaFave explains:

> In recent years[,] more Fourth Amendment battles have been fought about police activities incident to [investigative stops] for a traffic infraction, what courts call a "routine traffic stop," than in any other context. There is a reason why this is so, and it is not that police have taken an intense interest in such matters as burned-out taillights and unsignaled lane changes *per se*. Rather, the renewed interest of the police in traffic enforcement is attributable to a federally-sponsored initiative related to the "war on drugs."

LaFave, § 9.3, Vol. 4, pp. 358–59 (footnotes omitted).

hard", (B 6:16) put his nose in the keyhole[14] area where you would put the key, "and then indicated there were narcotics in the trunk." (B 6:19) Haskins explained that his K9 is a "passive alert dog", meaning he is trained to sit down to indicate . (B 6:23) Haskins asserted he walked his canine around the vehicle twice, but it is possible he actually walked his canine around the vehicle three times. (B 10:10) In reference to his dog barking that day, Haskins explained that "sometimes when he sits, when he indicates on drugs, he barks." (B 14:10) Haskins acknowledged barking is not part of the canine's training, it's a habit the dog has developed. (B 10:17) Haskins confirmed it was during the final pass that the canine finally indicated by sitting. (B 10:24) None of the work done with the K9 was captured on the video equipment in Daniels vehicle (the camera had been switched to the interior of his vehicle[15]). It was not known at the time that video existed (as captured by Haskins).

Haskins advised Daniels the canine gave him a positive alert, the vehicle was subsequently searched, and controlled substances were found. (B 24:6) Another officer that had arrived (Trooper Bawks) opened the trunk of the vehicle and observed a black suitcase, a large red duffle bag, and a smaller red duffle bag. The black suitcase and bigger red duffle bag was found to contain male clothing and marijuana. The smaller red duffle bag was found to contain female clothing and no controlled substances. (B 24:18)

---

[14] In reference to the canine sniffing the keyhole of the trunk, Haskins proposed "that's where he probably got the air coming out of the trunk area the strongest." (11:18)

[15] At the bench trial, Daniels confirmed that the traffic stop was recorded, he did review the video, it shows the entire traffic stop and interaction with Mr. Kavanaugh, however, it the video does not show the canine going around the vehicle. (D 50:16)

TESTIMONY AT THE BENCH TRIAL

A bench trial went forward on August 13 and 14, 2015 (The transcripts from the 13th and 14th were previously referenced as Exhibits D and E, and are referenced herein as D page:line and E page:line), and the trial testimony merits further attention. In addition to the two witnesses that testified at the suppression hearing, the lab technician and three officers testified. The additional officers were Jose Gamez, an officer with the Grand Rapids Police Department assigned to "MET," John Moore, a trooper with the Michigan State Police, Russell Bawks, also a trooper with the Michigan State Police, and James Zehm, an officer with the Berrien County Sheriff's Department.

Although ostensibly a "traffic stop case," it was revealed at trial that prior to the traffic stop, Gamez, an officer working for MET "happened to be driving through a parking lot of a hotel" (D 85:14) and apparently observed Kavanaugh's vehicle with the temporary plate. He said he observed a person (Kavanaugh) exit the hotel with two bags (D 85:14). Gamez testified Kavanaugh looked around, opened the trunk, looked around again, placed the bags in the trunk, looked around again, and then went back into the hotel. (D 86:1) Gamez claimed that this behavior caught his attention so he conducted surveillance. (D 86:6) Gamez testified that he never saw any marijuana, he never smelled any marijuana, and that aside from Kavanaugh's Florida plate, Gamez did not know anything about Kavanaugh before he saw him that day. (D 97:22)

Gamez testified that he noticed Kavanaugh's plate was a paper plate "because it doesn't look like a normal Florida plate." (D 102:12) However, Gamez was unable to be more specific, and could only say that it didn't look like a normal plate. Gamez testified that he was sure he gave Daniels a "detailed description of the vehicle and the plate", but

he could not recall exactly. (D 102:22) When asked if his description included that he thought it was a paper plate, Gamez stated that he was "fairly certain" he told Daniels this, and that "we've had some luck with that out of the Chicago area with paper plates. So I'm sure I told him that." (D 103:4) Gamez inspected the plate "only enough to get the information... needed" (D 98:5) When Gamez ran the plate number it came back as a Florida plate to that vehicle. Gamez testified that he was "not sure if it even had his name on it", but Gamez he also testified that he believed it *did*, but he was not positive. (D 98:19)

Gamez apparently followed Kavanaugh when he left the hotel, and confirmed that he did not observe Kavanaugh driving erratically, too fast or too slow. When asked if he observed any defects in the vehicle such as windows tinted too dark, Gamez stated that he did not recall. (D 104:15) Gamez said he did not see the occupants doing anything unusual. Gamez explained that as he followed Kavanaugh, he was no longer looking at the plate. He was focused on keeping the car in sight and coordinating his backup. (D 105:1) Gamez stated that if he had noticed the plate flapping in the wind, he "definitely would have said something." (D 105:8)

Gamez was unclear about any details relating to the travel from the hotel in Grand Rapids to where the stop occurred. (D 93:5) Gamez was unable to recall whether Kavanaugh stopped for gas; he believed "they went straight from there" but Gamez was not sure because he was trying to get other officers to come and assist with surveillance. (D 94:5) The other officers Gamez contacted were Anaya and Brasser. Gamez testified that he did not contact Patino, he thought his sergeant, Paul Kenny, contacted Patino.

(D 94:18) When asked if Gamez told any of these officers that he'd like to know what's inside that car, Gamez stated "I'm sure I did." (D 94:21)

Gamez testified that he followed Kavanaugh to "I don't know, Red Arrow Highway, maybe somewhere down that way. I'm not sure. It was the four mile marker to where they made the stop and then I broke off." (D 99:5) When asked if he saw any State Troopers before Kavanaugh was stopped, Gamez replied "I don't recall. I may have." (D 99:11) Gamez testified that he didn't think he saw Daniels making the stop. Once Daniels "rolled out on him", Gamez claimed he "backed off." After Gamez backed off he went to a park-n-ride off one of the exits. Gamez described his distance from Kavanaugh as "probably within a half mile - quarter mile" behind Kavanaugh for most of his surveillance. (D 99:22) Gamez was unable to recall whether he had visual contact of Kavanaugh at the time Daniels rolled out. (D 99:25) Gamez testified that he never went to the stop himself. (D 100:16) He apparently didn't know that his face was captured on Daniels in-car video.

Moore was another trooper with the Michigan State Police that was involved with the stop. When asked for his location before the traffic stop occurred, Moore stated that it was "hard telling." (D 119:20) Moore testified that he did not hear Gamez talking on the radio, but he knew Daniels was in the area looking for a "possible suspect vehicle in regards to a narcotic activity." Moore knew this because "we had talked about it earlier." (D 122:16) When asked who he was referring to, Moore testified that he couldn't remember. Moore was also unable to remember where they talked about it; he was not sure whether it was at their office or somewhere in Van Buren or Berrien County. (D 122:22)

Bawks was another trooper with the Michigan State Police involved with the stop, and testified that he learned of the traffic stop through a phone call from the MET team. (D 130:18) The officer he spoke to told Bawks that he would like to see a suspicious vehicle stopped if they could find a reason to stop it. (D 131:4) Bawks referred to this as a "BOL - be on the lookout for this vehicle." (D 131:13)

Daniels was the trooper that actually made the stop. He testified he was "sitting stationary in the median watching southbound traffic" (D 15:14) and claimed that a the driver of a passing vehicle looked at him (D16:6). He then claimed that he saw "that the plate was flapping - registration plate which appeared to be a paper plate of some sort." (D 16:10) On cross examination, however, he was asked how he learned of the silver Honda Accord. Daniels stated that he was contacted by Metropolitan Enforcement Team, more specifically, by Officers Gamez and Anaya (D 54:9) Daniels stated that they did not contact him directly, they contacted his supervisor, Patino. (54:19) On further exam, he explained that he recognized a car that matched a description that Patino had told him about (D 57:11) and that he was asked to stop the car. (D 58:5)

Daniels first claimed that as the car passed he observed the flapping plate in his rear-view mirror. (D 58:13) Daniels later claimed it was his side-mirror through which he observed it. (D 61:5) When asked why[16] he had previously stated it was his rear-view mirror, Daniels explained that he considers all three mirrors rear-view mirrors (D 61:10). When asked which of his three rear-view mirrors he observed the plate flapping, Daniels stated it was the driver's side mirror. (D 61:12) In the end, Daniels explained that he pulled out because of the initial information he was given about the vehicle, but

[16] The details of Daniels' vehicle position are discussed at pages 61 through 62 of the transcript.

also because he saw Kavanaugh look at Daniels as he passed and then noticed through his side "rear-view" mirror the flapping paper plate. (62:24)

After pulling out to pursue the vehicle, he said the vehicle exited the highway without using a turn signal (D 17:23), something for which he has never issued a ticket to anyone (D 65:21). Daniels then activated his overhead lights and claimed he observed[17] "furtive movements" (D 18:4). After stopping the vehicle, Daniels did not bother to inspect the plate to see if it was rigid or flappable. (D 63:2) He approached, asked for ID, and claimed Defendant's "hand was shaking as if he was nervous." (D 20:20) Daniels inquired about paperwork for the recently purchased vehicle, (D 20:25) and asked Kavanaugh to exit the vehicle and have a seat in his squad car (D 22:1). Kavanaugh did not close the door, which Daniels claimed was unusual (22:11). Daniels testified Kavanaugh scratched his leg and head, and looked out the passenger-side door (D 22:18).

Daniels testified that Kavanaugh said they stayed at the Travel Lodge Hotel (D 23:23) but according to Daniels the actual name of the hotel was the Grand Village Inn. (D 25:18)[18] Daniels minimized the fact that the actual receipt for where they stayed was in the car, and that Kavanaugh had told him as much. (74:11)

---

[17] On cross examination, it was shown that at the time he was observing "furtive movements," Daniels failed to notice a dog running back and forth in the back of the vehicle. (D 63:20) Daniels testified that he could not see a dog in the car until he approached. (D 64:1) The dog's movements, unlike the "flapping" plate, are visible in the video.

[18] In speaking with Brown, Daniels was told that "they went to an apple orchard and an art festival, and that they stayed at the Grand Village Inn in Grand Rapids." Brown confirmed that she and Kavanaugh were in a relationship. Kavanaugh stated that he and Brown were just coworkers and that Brown was not his girlfriend. (D 26:8)

Daniels checked the vin number and plate, and the vehicle registration came back to the Honda Accord and to Kavanaugh. (26:17) Daniels had functionally ended his investigation of the claimed traffic violation, and went on to ask him if "there was any drugs in the vehicle, any marijuana, cocaine, heroin, methamphetamine, or large amounts of currency over $10,000 of which he said no to all; Daniels asked for consent to search the vehicle and Kavanaugh denied consent. (D 27:12) Daniels testified that he decided to request a K9 unit when Kavanaugh denied consent. (D 75:22) When Daniels questioned Kavanaugh further about drugs, Kavanaugh said that "he doesn't do drugs" (D 27:24) Daniels told Kavanaugh that he was going to call for a canine unit and the canine would perform a free air sniff to check for narcotics. (D 28:7)

While Daniels was the officer to make the stop, he testified that the next officers to arrive were Bawks and Moore[19], and then Haskins.[20]

Haskins testified he was on patrol in Bainbridge Township when he heard a call over the radio come that a trooper needed a canine on I-196 and responded to that location. (D 137:25) Haskins testified about how calls are made and received and central dispatch's role(D 138). Haskins testified that he didn't know whether he heard the call over the radio was through dispatch or if he heard the troopers call for a dog. (D 144:19)

---

[19] Moore confirmed he assisted Daniels with a traffic stop by taking photographs (D 109:24) including Kavanaugh, Brown, his vehicle, suitcases and the contents of those suitcases, and a ledger that appeared to have something to do with drug proceeds. (D 110:9) He field tested the suspected marijuana. (D 116:2)

[20] When asked if anyone else arrived after Haskins, Daniels testified that he could not recall. (D 78:13) Bawks testified that he did not see Gamez before Kavanaugh was stopped. Bawks didn't see Gamez until officers took Kavanaugh's vehicle to Hagar Township fire barn; Gamez just arrived there somehow. (D 133:5) Bawks testified that after the marijuana was found, he called Gamez and advised him of what was found, as Gamez had requested. (D 133:17) It is unclear why the officers where obscuring the fact that Gamez was present roadside near the end of the stop, and can be seen on the video.

Haskins confirmed he was called by radio for assistance, but was not sure who called him. (D 145:2) Daniels testified, however, that he requested a canine unit by sending a message through his computer to either Bawks or Moore. (D 75:6) When asked if he was aware that a canine unit had been called for, Gamez explained that "there's two different states radio channels... the channel that I was conducting the surveillance with them, giving them information, and then the channel they call out for assistance. I don't have that channel, so I didn't hear the dog." (D 101:13) Gamez stated that he does not have access to all of the Michigan State Police's communication channels. Gamez stated that he does not have a computer system. (D 101:23) At the same time, Moore testified he heard over the radio that the traffic stop had occurred, and he was aware that a canine unit had been called for, but he could not recall whether he heard anyone respond over the radio. (D 120:8) Moore contradicted his previous testimony in stating that he really couldn't remember if he was there when Daniels called for the canine unit or if he heard it over the radio. (D 120:24) He discussed the method for how a canine unit is called (D 121).

However he was called, Haskins eventually arrived, and he ran his canine around the vehicle. Haskins testified that, "I always start my searches up at the passenger side headlight, and then I go in a counter-clockwise motion around the vehicle. The dog searches with his nose around the exterior of the vehicle. And I always do two passes unless there's an indication." (D 139:16) According to Haskins, on the first lap around the vehicle the canine had a change of behavior around the trunk area, and on the second lap the canine indicated by putting his nose to the keyhole that unlocked the trunk and then sat down, which indicated a positive alert for narcotics odor. (D 140:9)

The canine only alerted to the trunk area. (D 140:23) Haskins rewarded the canine with a tennis ball, and informed the other officers of the positive alert on the trunk area. (D 141:18)

Haskins confirmed that the canine is trained not to attack, bite, or bark when he detects; the canine is in fact trained to sit down. (D 142:7) Haskins admitted that even though his dog is trained to sit, he "sometimes does bark." (D 142:25) Haskins confirmed that the canine is not trained to bark when he indicates. (D 143:9) When asked if the canine has ever had a false positive in the field, Haskins explained that "you can't determine if there's a false hit because it's not a controlled environment." Haskins stated there have been times when he's indicated on vehicles, and no drugs were found in the vehicles. (D 143:24)

After Daniels understood the dog had indicated on the vehicle (D 28:16), he placed Kavanaugh in handcuffs and the vehicle was searched; marihuana[21] was located in the trunk. (28:22) Daniels stated it was approximately 22 minutes from the time he called in the canine unit to the time the canine unit arrived. (30:7)

According to Gamez, once the officers located marijuana in the vehicle, they contacted him and told him what was found. Gamez was told that Kavanaugh was given Miranda rights and agreed to speak with officers. Officers advised Gamez that Kavanaugh admitted he was in Grand Rapids to buy marijuana. Gamez asked to interview Kavanaugh. Gamez failed to read Kavanaugh his rights prior to interviewing him. (D 89:25) According to Gamez, Kavanaugh indicated that Brown had nothing to do

---

[21] According to Daniels, Moore and Bawks removed several large clear plastic bags from the trunk area of the vehicle. In the bags there appeared to be "high-grade marijuana." (D 29:25)

with the marijuana found in the vehicle. (D 90:10) Kavanaugh stated that he was fronted 15 pounds of marijuana by a subject that Kavanaugh declined to identify. Kavanaugh told Gamez that he was to pay $3,000 per pound, that he owed the unidentified seller $45,000, and that he would make a profit of $300 per pound. (D 91:15) In reference to the ledger notebook found, Kavanaugh stated that he kept records of drug sales in it for about the last three or four months. Kavanaugh also stated that the other substance found was marijuana wax. Kavanaugh sold the wax for about $30 per gram. (D 91:25)

John Rorabeck testified regarding his forensic analysis of the marihuana. Rorabeck testified that he has been the director of the forensic lab at the Saint Andrew's University campus for the last five and a half years. Rorabeck's duties include receiving evidence from officers and testing it for the presence of controlled substances, storing the evidence, and preparing reports based on his analysis. Rorabeck estimates he does around 9,000 analyses per year. (E 5:1) Rorabeck is licensed to handle controlled substances through the State of Michigan and also through the US Department of Justice DEA. (E 5:21) Rorabeck confirmed he is not certified through ASCLD, nor does he have any additional certifications. (E 6:21) He described the evidence he received (8:5), analyzed the contents, and issued lab report. (8:16) The results were "consistent with the characteristics of cannabis." (E 17:3) Rorabeck confirmed that the sticky substance was positive for THC. (E 18:4) Rorabeck testified the total weight of the marijuana was 6,938.4 grams, or 15.2 pounds, and the sticky residue from the sheets was 290 grams. (E 20:22)

James Zehm also testified. Zehm said he had attended narcotics investigator school, case management school, supervisor school, through the course of an investigation it is not uncommon for him to "talk to people who get arrested, who have been arrested, to find out what the trends are." (E 23:22) According to Zehm, there is no doubt in his mind that the way in which the marijuana was packaged indicates possession with intent to deliver. (E 26:20) Zehm estimated that the price of the marijuana "would be in the ballpark figure of of $2,000 to $3,000 per pound." (E 29:9)

ANALYSIS OF THE COURT OF APPEALS

While the evidentiary hearing was held before *Rodriguez,* at the time of the bench trial, and again after trial, the court ruled in a similar manner, stating, "The delay was - - not excessive - - ten minutes or less from the Court's viewing of the video tape." (Transcript dated August 14, 2015, at Attachment B, page 52, line 11-13.) While the court was without the benefit of *Rodriquez* at the time of the suppression motion, the correct legal standard was extensively briefed and argued in August of 2015. Applicant does **not** assert the trial court did **not** err.

"On-scene investigations into other crimes" are not a part of the "mission" of the traffic stop. *Rodriguez v United States,* 575 US 1, ___; 135 S Ct 1609, 1616; 191 L Ed 2d 492, 500 (2015). In *Rodriguez,* a 7-8 minute delay, based on a criminal investigation and a dog sniff, was unconstitutional. *Rodriguez,* 135 S Ct at 1613 ("All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs.").

The Court of Appeals recognized the principles in *Rodriquez,* which explained that any delay after the mission of the traffic stop has been, or should have been,

expeditiously completed is unconstitutional as stated in *Rodriguez*,135 S Ct at 1616 (emphasis added):

> If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." *Caballes,* 543 U.S., at 407, 125 S.Ct. 834. As we said in *Caballes* and reiterate today, **a traffic stop "prolonged beyond" that point is "unlawful."** Ibid. **The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket,** as Justice ALITO supposes, post, at 1624-1625, but whether conducting the sniff "prolongs"—i.e., adds time to—"the stop," supra, at 1615.

As stated by the Court of Appeals, "Defendant argues, and we agree, that the traffic stop was completed when the officer determined that the vehicle was owned by defendant, gave him a warning about the traffic violations, and told him there would not be a ticket issued." *People v Kavanaugh,* slip op pg 3; ____ Mich App ____; ____ NW2d ____ (for publication) (Mich COA #330359, July 6, 2017). *See also, People v Kocevar,* slip op pg 11 (Mich COA # 329150, 3-16-17) (unpublished) The mission of the traffic stop consists only of the time it takes, or should reasonably take, to expeditiously issue a ticket or warning and check to determine if the driver has any warrants and is legally driving the vehicle (i.e., running the – and precautions taken to ensure the officer's safety during the time it takes to do these things. This was clearly indicated in *Rodriguez,* 135 S Ct at 1614-1615 (emphasis added):

> In *Caballes,* however, we cautioned that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket. 543 US, at 407, 125 SCt 834. And we repeated that admonition in *Johnson*: The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop." 555 US, at 333, 129 SCt 781. See also *Muehler v Mena,* 544 US 93, 101, 125 SCt 1465, 161 LEd2d 299 (2005) (because unrelated inquiries did not "exten[d] the time [petitioner] was detained[,] . . . no additional Fourth Amendment justification . . . was required"). An officer, in other words, may conduct certain unrelated checks during an otherwise lawful traffic stop. But contrary to Justice

> ALITO's suggestion, post, at 1625, n. 2, he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual. But see post, at 1623-1624 (ALITO, J., dissenting) (premising opinion on the dissent's own finding of "reasonable suspicion," although the District Court reached the opposite conclusion, and the Court of Appeals declined to consider the issue).
>
> Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." Caballes, 543 U.S., at 408, 125 S.Ct. 834. **Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance.** See *Delaware v Prouse,* 440 US 648, 658-660, 99 SCt 1391, 59 LEd2d 660 (1979). See also 4 W. LaFave, Search and Seizure § 9.3(c), pp. 507-517 (5th ed. 2012). These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly. See *Prouse,* 440 US, at 658-659, 99 S.Ct. 1391; LaFave, Search and Seizure § 9.3(c), at 516 (A "warrant check makes it possible to determine whether the apparent traffic violator is wanted for one or more previous traffic offenses.").

On-scene investigation for criminal activity detours from the mission of the traffic stop. Also, any precautions related to the officer's safety during that detour from the mission of the traffic stop, such as checking for warrants of passengers, is not within the mission of the traffic stop. These facts are clear from *Rodriguez,* 135 S Ct at 1616 (emphasis added):

> Unlike a general interest in criminal enforcement, however, **the government's officer safety interest stems from the mission of the stop itself**. Traffic stops are "especially fraught with danger to police officers," *Johnson,* 555 U.S., at 330, 129 S.Ct. 781 (internal quotation marks omitted), so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. Cf. *United States v. Holt,* 264 F.3d 1215, 1221-1222 (C.A.10 2001) (en banc) (recognizing officer safety justification for criminal record and outstanding warrant checks), abrogated on other grounds as recognized in *United States v. Stewart,* 473 F.3d 1265, 1269 (C.A.10 2007). **On-scene investigation into other crimes, however, detours from that mission.** See supra, at 1615. **So too do safety precautions taken in order to facilitate such detours.**

Delay associated with bringing a dog to the scene of a traffic stop is unconstitutional – unless there is independent reasonable suspicion of a drug offense – because the use of a dog for drug detection is not within the scope of the mission that is justified by a stop for a violation of the Motor Vehicle Code. This was clearly established in *Rodriguez v United States, supra*. As explained by the Court of Appeals here:

> In *Rodriguez*, the United States Supreme Court definitively [held] that "a dog sniff is not fairly characterized as part of the officer's traffic mission." *Rodriguez*, 135 S Ct at 1615. The Court explained that although police officers "may conduct certain unrelated checks during an otherwise lawful traffic stop[,]" they "may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Id.* at 1615. The Court opined, "[A] police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Id.* at 1612. Once the constitutionally-sound basis for the traffic stop has been addressed, any further extension of the detention in order to conduct "[o]n-scene investigation into other crimes" or for any other reason is a Fourth Amendment violation unless during the traffic stop new facts come to light that demonstrate "reasonable suspicion of criminal activity." *Id.* at 1616.

Kavanaugh, at slip op pg 4(footnote omitted). Also, the Court of Appeals recognized that questioning about drugs or other criminal investigation that extends the length of the stop results in an unconstitutional detention even if the officer has not yet completed all tasks related to the mission of the traffic stop. *Rodriguez,* 135 S Ct at 1616. "The critical question . . . is not whether the dog sniff occurs before or after the officer issues a ticket, . . . but whether conducting the sniff 'prolongs' – i.e., adds time to – the 'stop.'" *Kavanaugh,* slip op pg 4, n 5. Even if the officer has not yet completed the traffic violation matters, if conducting a canine sniff causes that completion to be delayed, it remains a constitutional violation. As stated in *Rodriguez* , the question is not 'whether the dog sniff occurs before or after the officer issues a ticket," but "whether conducting the sniff 'prolongs'-i.e., adds time to-'the stop[.]' *Rodriguez*, 135 S Ct at 1616.").

The applicant's focus on the Court of Appeals consideration of the in-car video is generally misplaced, and any concerns expressed are specific to this case. But as a preliminary matter, Mr. Kavanaugh suggests to this court that the applicant's arguments regarding the officer's assertion that he observed movements in the car while on the exit ramp are concerning to the extent applicant suggests this testimony was ignored. It was not. It was expressly addressed in footnote 10 of the opinion, and necessarily acknowledged in footnote 4.

As to all of matters relied upon by the trial court as grounds for suspicion, they were properly analyzed the Court of Appeals in light of the controlling legal principles, and Court of Appeals in footnote 11 explained the parts they found clearly erroneous. The Court of Appeals reservations about observations of nervousness are appropriate. Likewise, the Court of Appeals carefully outlined things noted by the officer but that were not grounds to reasonably suspect criminal activity. While the applicant argues the Court of Appeals should have ruled differently, the applicant fails to identify any clear legal errors by the Court of Appeals that would support granting leave.

Instead, applicant suggests, "There is a better way." But a review of the legal argument that follows leaves it vague as to how the "better way" is distinct from established law in Michigan, or frankly any different from how appellate courts generally review any other evidence that observed by the appellate courts equally as well as the trial court judge. Likewise, the appellate courts can read the witnesses explanations of what is shown by the evidence (video), equally as well as the trial court judge can listen to the witness's understanding of what the video shows. Here, the Court

of Appeals even recognized those parts of the video that the officer's observations may have been different than what was plain to see on the recording.

II. The applicant's second argument points to a number of concerns without identifying any clear legal errors. The general governing principles are well established, and because the Court of Appeals did not state a novel or erroneous legal principle, and because applicant is not asking for an obvious change in the law, leave should not be granted.

> *Standard of Review* -A lower court's factual findings are reviewed for clear error, and a finding is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Issues of statutory interpretation and issues of law are reviewed *de novo*. *People v Lown*, 488 Mich 242, 254; 794 NW2d 9 (2011); People v. Keller, 479 Mich 467; 739 NW2d 505 (2007).

It would appear that the applicant conflates the notions of *parties* being obliged to admit certain evidence, on one hand, with the *trial court's obligation* (and appellate court's obligation) to consider evidence that is admitted, on the other. It would seem that the Court of Appeals found no fault in the parties seeking the admission of evidence, but instead, that the trial court simply took the officer's word for what happened, instead of completing an appropriate review of the evidence offered. While again these concerns are specific to this particular matter, this court should be very concerned to the extent a disparity between the officer's testimony and what is recorded on the video is so great that it raises questions about the trial court's finding that the officer was credible. See Opinion, FN 11.

Further, the applicant's concerns about the creation of some "obligation" to offer evidence in a situation where none of the parties wish to offer the evidence seems to be both an illusory situation and a situation that did **not** occur in this matter, and as such, is not properly before this court for review. Again, the application should be denied.

CONCLUSION and RELIEF REQUESTED

Apart from Defendant maintaining his arguments relating to the seeming lack of a legitimate reason to stop the defendant and the impermissible delay, this court might be concerned about the tactics used here, as well as other related tactics, that are improper. It is concerning where alleged traffic violation was not the ***reason*** for the stop, but instead the ***excuse*** for the stop. The reliance on so called conflicting travel plans (*Richardson*[22]) is likewise troublesome, particularly when relied upon to avoid what would otherwise be an unconstitutional stop.[23] "Very few drivers can traverse any

---

[22] *U.S. v. Richardson*, 385 F3d 625 (CA6, 2004). The 6th Circuit found the occupants of a vehicle stopped for a traffic violation were unlawfully seized. Driver was detained because of his nervousness, conflicting explanations of the group's travel plans, and the movement of defendant into the driver's seat. Nothing inherently suspicious about any of these observations, and under the totality of the circumstances, factors did not add up to reasonable suspicion of criminal activity. (Stressing that the interest in freedom from unlawful seizure is personal to all occupants of a vehicle that is detained.)

[23] "Searches conducted without a warrant are unreasonable *per se*, and in order to justify a search without a warrant, the officers must demonstrate that the conduct fell within one of the narrow specific exceptions to the warrant requirement." *People v. Griel Thomas*, 201 Mich App 111, 116; 505 NW2d 873 (1993) citing *People v. Davis*, 442 Mich 1, 9; 497 NW2d 910 (1993). Warrantless searches involving automobiles require the prosecution to meet its burden of proving that the search was valid. *People v White*, 392 Mich 404, 411; 221 NW2d 357 (1973) "To sustain the validity of a warrantless search the burden rests on the people to demonstrate that the police acted in a reasonable manner, based on probable cause and in response to an exigent circumstance bringing the search under one of the specifically established exceptions to the warrant requirement. If the people fail to meet this burden it is the duty of our courts to suppress the admission into evidence of any fruits of the unwarranted search." *White*, 392 Mich at 410-11; 221 NW2d 357 (1973) citing *Coolidge v New Hampshire*, 403 US 443, 454-455; 91 S Ct 2022; 29 L Ed 2d 564 (1971), *People v Mason*, 22 Mich App 595, 616–-617; 178 NW2d 181 (1970) and *Mapp v Ohio*, 367 US 643; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). "Over and again this Court has emphasized that . . . that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes and citations within the footnotes omitted).

appreciable distance without violating some traffic regulation."[24] Because the offense can be insignificant, the driver may be told he will merely be given a warning, but the stop nevertheless can include a criminal-history and outstanding-warrants records check, as well as questioning about their identities, the reason for their travels, and their intended destinations. And whether they have drugs on their persons or in the vehicle. Mere questioning, even if politely conducted, is nevertheless "intense, very invasive and extremely protracted."[25] The driver may be confronted with a virtual barrage of questions about drugs and related matters.[26]

The Court of Appeals properly found that Kevin Kavanaugh's federal and state constitutional rights were violated. He also maintains that his right to due process and his right to provide a meaningful defense were also compromised by the prosecution's failure to provide crucial evidence. While police are sworn to uphold the Constitution, they are, after all, "engaged in the often competitive enterprise of ferreting out crime."[27] The Court of Appeals opinion will not allow trial courts to treat the Fourth Amendment as largely an irrelevancy in the context of "routine traffic stops." Mr. Kavanaugh asks this court to deny leave. Even though the court's factual findings are reviewed for clear

---

[24] B. James George, Jr., *Constitutional Limitations on Evidence in Criminal Cases* 65 (1969).

[25] Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 Mich. L. Rev. 651, 685 (2002).

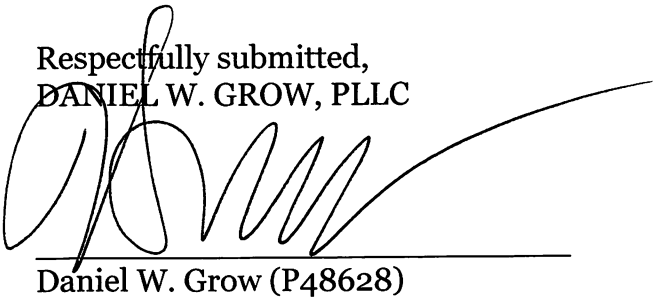
[26] E.g., *Maxwell v. State*, 785 So. 2d 1277 (Fla. Dist. Ct. App. 2001).

[27] *Johnson v. United States*, 333 U.S. 10, 14 (1948). Police have been relentless in pushing their claimed authority relating to traffic stops to the absolute limits. As Justice Jackson noted in his dissent in *Brinegar v. United States,* "the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit." 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

error, it is Defendant's position that the Court of Appeals correctly concluded it was left with a definite and firm conviction that a mistake had been made.

WHEREFORE Defendant-Appellant requests this Honorable Court to deny the application for leave, and to dismiss the charges against Defendant, along with any such additional relief this court deems just.

Respectfully submitted,
DANIEL W. GROW, PLLC



Daniel W. Grow (P48628)
Attorney for Defendant-Appellant
800 Ship Street, Suite 110
Saint Joseph, MI 49085
(269) 519-8222

Dated: October 26, 2017